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Long Island Head Start Child Development Services, Inc. and District Council 1707, Local 95, American Federation of State, County and Municipal Employees, AFL–CIO. Case 29–CA–26343

September 25, 2009

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

Background

On September 29, 2005, the Board issued its Decision and Order in this proceeding.¹ The Board held that the Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally changing its health insurance carrier and plan on June 1, 2004. The Board found that, by entering into negotiations for a successor collective-bargaining agreement, the parties forestalled the automatic renewal of their existing agreement, despite the absence of any manifestation of the contractually-required notice of intent to terminate. Because the management-rights clause, which entitled the Respondent to make changes in insurance benefits unilaterally, did not survive the expiration of the contract, the Board found that it did not privilege the Respondent's action.

Subsequently, the Respondent filed a petition for review of the Board's Order with the United States Court of Appeals for the Second Circuit, and the Board cross-petitioned for enforcement. On August 9, 2006, the court remanded the proceeding to the Board. *Long Island Head Start Child Development Services v. NLRB*, 460 F.3d 254 (2d Cir. 2006). The court found that the precedent on which the Board relied held only that negotiations forestalled automatic renewal when the contractual notice was untimely or improper in form.² The court held that this precedent did not apply when the required notice was lacking entirely and that the Board had not adequately explained a rationale for extending the precedent to such circumstances.

By letter dated March 14, 2007, the Board notified the parties that it had accepted the remand. On October 14, 2008, the Board issued a notice and invitation to the parties and interested amici to file briefs in this proceeding.

¹ 345 NLRB 973 (2005).

² The Board relied on *Ship Shape Maintenance Co.*, 187 NLRB 289 (1970); *Lou's Produce, Inc.*, 308 NLRB 1194, 1200 fn. 4 (1992), enf. 21 F.3d 1114 (9th Cir. 1994); *Big Sky Locators, Inc.*, 344 NLRB 257 (2005); and *Drew Div. of Ashland Chemical Co.*, 336 NLRB 477, 481 (2001).

The notice stated that briefs were to respond to specific questions pertaining to the issues raised by the court. These questions addressed the implications, in terms of policies under the Act and sound collective-bargaining practices, of a rule that engaging in negotiations constitutes a waiver of the contractual notice requirement and prevents automatic renewal. Thereafter, the General Counsel, the Charging Party, and the Respondent filed briefs on remand.

Positions of the Parties

The General Counsel, in his brief, urges the Board to affirm its previous conclusion that the Respondent's unilateral changes were unlawful. Rather than addressing the questions posed by the Board regarding the effect of bargaining on the contractual notice requirement, however, the General Counsel presents a new theory in support of this result. The General Counsel maintains that the Board and court premised their analyses on the erroneous assumption that the parties' 1998–2001 collective-bargaining agreement had automatically renewed for successive 1-year periods through May 4, 2004. According to the General Counsel, the 1998–2001 agreement never automatically renewed and instead expired at the end of its initial term on May 4, 2001. The General Counsel urges the Board to rely on the parties' course of conduct between the contract's 2001 expiration and the Respondent's June 1, 2004 unilateral change, and not merely on their negotiations, in finding that no collective-bargaining agreement was in effect to privilege the Respondent's action.

The General Counsel maintains that the parties' conduct during 2001–2004 shows a mutual understanding that the 1998–2001 contract had terminated. The General Counsel asserts that the parties treated the contract as having expired and that the Respondent had never before claimed that it remained effective. The General Counsel further contends that the parties began bargaining for a successor agreement as early as 2001, continuing until they reached a Memorandum of Agreement (MOA) on April 22, 2004. Moreover, he argues that the MOA itself demonstrates an understanding that the prior agreement had expired. In the General Counsel's view, the MOA created a collective-bargaining agreement retroactive to 2001, which would have been unnecessary if the previous contract had rolled over since that time.

The General Counsel next argues that the MOA expressed the parties' intent that the retroactive contract terminate on May 4, 2004. In support of this view, the General Counsel notes that the MOA called for bargaining for a successor agreement to commence "as soon as practicable," even though, when the parties signed the

MOA, the contractual deadline for notice of termination had already passed.

Finally, the General Counsel points out that the requisite ratification of the MOA by both parties had not occurred at the time of the unilateral change. The Union notified the Respondent of ratification by the unit employees on May 18, 2004, and the Respondent's board of directors did not ratify it until June 28, 2004. Therefore, the General Counsel maintains that the prior contract had expired and the provisions of the MOA had not taken effect when the Respondent implemented the insurance plan changes.

Like the General Counsel, the Union declined to respond to the questions posed by the Board in the invitation to file briefs. The Union agrees with the General Counsel's contention that the 1998–2001 contract expired at the end of its initial term, after which the parties bargained for a successor agreement. Additionally, the Union argues that the MOA's provision that the parties would begin negotiations "as soon as practicable" constituted an explicit waiver of any notice and that the parties agreed to this waiver because compliance with the deadline for notice was impossible when the parties executed the MOA. The Union also asserts that the parties' subsequent negotiations further show that they had notice of intent to modify the contract and, in fact, did so.

The Respondent, by contrast, cites the court's finding that the parties did not dispute that the 1998–2001 contract renewed automatically in 2001, 2002, and 2003. The Respondent maintains that the contract modifications implemented by the MOA were retroactive only from the date of execution until the May 4, 2004 expiration date of the existing contract.³ The Respondent maintains that, in the absence of notice, the contract renewed again on May 4, 2004. Moreover, in the Respondent's view, by finding that bargaining waives the contractual notice requirement, the Board would improperly interfere with the parties' agreement and would dissuade parties from entering into negotiations after the deadline for notice had passed. Accordingly, the Respondent submits that bargaining should have no effect on contract renewal.

Discussion

We accept the court's decision as the law of the case, and we have reviewed the record and briefs on remand in

³ The Respondent also asserts that bargaining for a successor agreement began in 2003 and that no party argues that those negotiations prevented the renewal of the contract. Although the Board and court found that negotiations began in 2003, the date on which bargaining began does not affect our conclusion, in light of the court's finding that the contract remained in effect through at least May 4, 2004.

light of that decision.⁴ For the reasons set forth below, we reverse our prior decision and find that the Respondent's unilateral changes of insurance carrier and plan were lawful under Section 8(a)(1) and (5).

Treating the court's remand as the law of the case, we accept its determination that extant Board precedent does not resolve the question presented in this proceeding. Therefore, unless we extend the precedent or find on another basis that the contract terminated, we must conclude that the parties' agreement automatically renewed for an additional year beginning May 4, 2004, and that the Respondent's June 1, 2004 changes were privileged.

Through the invitation to file briefs, the Board provided the parties and interested amici an opportunity to address the legal issue of whether we should find contract termination based on bargaining even in the absence of any contractually required notice. The Respondent urges the Board not to rely on bargaining by the parties as a demonstration of intent to terminate. Neither the General Counsel nor the Union has responded to the questions posed by the Board. Instead, the General Counsel proffers, as an alternative rationale for finding that a collective-bargaining agreement was not in effect when the Respondent unilaterally changed its health insurance carrier and plan, a theory which is substantially precluded by the court's decision. The General Counsel predicates his proposed analysis on the central contention that the parties' 1998–2001 contract expired at the end of its initial term. However, the court found it undisputed that the agreement renewed automatically and was effective through at least May 4, 2004. That finding stands as the law of the case. Therefore, we reject the General Counsel's assertions that the contract expired in 2001 and that the parties' conduct demonstrated their mutual understanding of that termination.

Furthermore, the General Counsel argues that the parties mutually intended that the contract modifications in

⁴ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed ___ U.S.L.W. ___ (U.S. September 11, 2009) (No. 09-328); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), petition for cert. filed 77 U.S.L.W. 3670 (U.S. May 22, 2009) (No. 08-1457); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. August 18, 2009) (No. 09-213). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petitions for rehearing denied Nos. 08-1162, 08-1214 (July 1, 2009).

the April 22, 2004 MOA would expire on May 4, 2004. In support of that contention, the General Counsel cites the MOA's provision that the parties would commence negotiations for a successor agreement as soon as practicable and the impossibility, even on the date of the MOA, of providing timely notice of termination. Neither of these facts is plainly inconsistent with automatic roll-over under the provisions of the 1998 contract and the modifications prescribed in the MOA. Contrary to the General Counsel, we do not find that this scant evidence warrants an inference that the parties intended to forestall automatic renewal, so that no contract would exist after May 4, 2004. Therefore, this argument is also unavailing.

Because the General Counsel and Charging Party have failed to address, as requested in the invitation to file briefs, the legal issue of whether bargaining alone should be sufficient to constitute a waiver of any expression of the contractually required notice of termination, we decline to resolve that issue in this proceeding.

Conclusion

In view of the court's determination that Board precedent does not establish that the parties, by engaging in

bargaining, waived entirely the notice requirement for contract termination, and the General Counsel's failure to propose an alternative theory concordant with the law of the case, we conclude that the parties' contract, including the management-rights clause, remained in effect and that the Respondent acted lawfully by exercising the discretion provided by the contract. Therefore, we dismiss the complaint.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. September 25, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD